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No. 88-73

In the Supreme Court of the United States

OCTOBER TERM, 1988

BEN FARRELL KIRK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court committed reversible error by not providing petitioner with transcripts of all the testimony in a previous criminal trial that was related to the present case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4435-4444) is reported at 844 F.2d 660.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1988. A petition for rehearing was denied on June 14, 1988. The petition for a writ of certiorari was filed on July 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Hawaii, petitioner was convicted on 56 counts of mail fraud (18 U.S.C. 1341), three counts of wire fraud (18 U.S.C. 1343), two counts of interstate

transportation of stolen property (18 U.S.C. 2314), one count of racketeering (18 U.S.C. 1962(c)), and one count of conspiracy (18 U.S.C. 371). He was sentenced to concurrent prison terms of five years on each count and a fine of $76,000.

1. In 1979, petitioner and three others formed a company called W.P.M.K., which sold the right to use vacation homes, primarily in Hawaii. Customers of W.P.M.K. purchased the right to use the housing for a specified number of weeks. Petitioner ran the day-to-day operations of W.P.M.K. while the other founders financed the business. In 1980, petitioner hired James Quincy to handle marketing operations, customer service, and maintenance. Pet. App. 4437.

Acting in concert with others and through W.P.M.K., petitioner engaged in a scheme to oversell time in the vacation homes. Under that scheme, the company sold unwitting consumers the right to use the housing one month a year for eight years. W.P.M.K., however, had only three-year leases or purchase agreements for the same facilities. Thus, W.P.M.K. sold 5,270 weeks of use although it had an inventory of only 3,068 weeks. Pet. App. 4438.

2. Petitioner was indicted along with nine other persons, two of whom later pleaded guilty and testified for the government. Petitioner was involved in three trials. After two weeks of his initial trial, the district court granted petitioner's motion to sever his trial.[1] At petitioner's second trial, the jury could not reach a verdict. Petitioner was convicted at his third trial. Pet. App. 4438-4439.

Prior to the third trial, petitioner, an indigent, requested various transcripts: (1) the entire transcript of the first trial, from which his case was severed; (2) the transcript of

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[1] The cases against two other defendants were also severed (Pet. App. 4438).

his second trial, which did not result in a verdict; and (3) the transcript of a separate, ongoing trial of co-defendant Quincy. The district court provided petitioner with the transcripts of six witnesses who testified at the first trial and the entire transcript of the testimony at the second trial. The court, however, denied the balance of petitioner's request. The court found that "there is no indication that the trial proceedings involving the other nine defendants would be relevant to" petitioner (C.A. App. 103).

3. The court of appeals affirmed. The court of appeals did not decide whether petitioner was entitled to all the transcripts that he sought. Rather, the court held that any error in failing to provide the transcripts "was harmless beyond a reasonable doubt" (Pet. App. 4441). The court's conclusion rested on the "overwhelming evidence" of petitioner's guilt and the court's observation that petitioner "was denied no material in this case that would have permitted him to refute the evidence against him" (*ibid.*).

ARGUMENT

1. Petitioner contends that he should have been given transcripts of the testimony of his co-defendants at the first trial.[2] He argues (Pet. 6-7, 11) that he needed those transcripts to help him decide whether to call those co-defendants as witnesses. That claim is without merit.

The government "must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Britt* v. *North Carolina*, 404 U.S. 226, 227 (1971). The Court in *Britt* identified two factors that are relevant to the deter-

[2] Petitioner does not renew his claim for the transcript of Quincy's trial.

mination of need: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript" (*ibid.*).

Here, the district court provided petitioner with all the transcripts that he needed. Four defendants remained in the first trial after the severance; two of those defendants testified, and petitioner was provided with the transcript of the testimony of one of those defendants, James Quincy. It is clear that petitioner did not need the transcript of the testimony of the other defendant in order to decide whether to call him as a witness at petitioner's trial: The strategy of the remaining defendants at the first trial was to shift the blame for any offenses to petitioner; that is why petitioner sought a severance and why the district court granted petitioner's request. Accordingly, petitioner knew without the benefit of any transcript that it was not in his interest to call the defendants at the first trial to testify on his behalf.[3]

2. Petitioner next argues (Pet. 13-19) that the court of appeals erred in using a harmless-error analysis. He contends that no error in failing to provide a needed transcript can be harmless. Petitioner, however, has not preserved that claim. In the court of appeals, petitioner acknowledged (C.A. Br. 11) that such an error may be harmless.

In any event, this Court has never suggested that an error in failing to provide a defendant with transcripts cannot be harmless. And the courts of appeals have consistently applied the harmless-error rule in that context.

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[3] In passing, petitioner also argues (Pet. 20) that the district court erroneously failed to provide him with transcripts of the testimony of certain victims at the first trial. However, each of those victims was called as a witness at the second trial, and petitioner was provided with a full set of the transcripts of that trial.

See, *e.g.*, *United States* v. *Rosales-Lopez*, 617 F.2d 1349, 1356 (9th Cir. 1980); *United States ex rel. Moore* v. *People of Illinois*, 577 F.2d 411, 417 (7th Cir. 1978), cert. denied, 440 U.S. 919 (1979); *Martin* v. *Rose*, 525 F.2d 111, 113 (6th Cir. 1975); *United States* v. *Bamberger*, 482 F.2d 166, 168-169 (9th Cir.), cert. denied, 414 U.S. 1041 (1973); *United States* v. *Bueno*, 470 F.2d 154, 155 (5th Cir. 1972), cert. denied, 411 U.S. 949 (1973).

Of the many cases that petitioner cites (Pet. 14-19), only three refused to consider whether an erroneous failure to provide requested transcripts was harmless: *United States* v. *Jonas*, 540 F.2d 566, 572 (7th Cir. 1976); *People* v. *Sanchez*, 622 P.2d 604, 605 (Colo. Ct. App. 1980); and *People* v. *Hosner*, 15 Cal. 3d 60, 538 P.2d 1141, 1148, 123 Cal. Rptr. 381 (1975). Those three decisions, however, do not help petitioner. In later cases, both the Seventh Circuit and the Colorado Court of Appeals applied a harmless-error analysis to a failure to provide transcripts. See *United States ex rel. Moore* v. *People of Illinois*, 577 F.2d at 417; *People* v. *St. John*, 668 P.2d 988, 989 (Colo. Ct. App. 1983). And in *Hosner*, the Supreme Court of California held only that the failure to provide an indigent defendant with a transcript of his *own* previous trial cannot be harmless. Here, petitioner was provided with a full transcript of his own previous trial; he complains only about the failure to provide him with transcripts of the testimony from the first trial that was given *after* his case had been severed. Thus, the California court's decision in *Hosner* does not squarely conflict with the Ninth Circuit's analysis in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS JR.
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

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